NO. 88-1398

Supreme Court, U.S.
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# In the
# Supreme Court of the United States

OCTOBER TERM, 1988

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LUMAR MARINE, INC.,
Petitioner

VERSUS

JULES SIMEON, SR. and IDA MAE GRIFFIN SIMEON, Wife of Jules Simeon, Sr.
Respondents

VERSUS

T. SMITH AND SON, INC.,
Respondent

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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DAVID L. CARRIGEE
JAMES G. BURKE, JR.
20th Floor, Energy Centre
New Orleans, Louisiana 70163
Telephone: (504) 569-2900
and
BURKE & MAYER, Of Counsel

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

## QUESTIONS PRESENTED

1. Whether the law of admiralty recognizes a right of contribution between joint tort-feasors which do not share common legal liability toward the injured party.
2. Whether joint and several liability contravenes the loss apportionment policy inherent in the doctrine of comparative negligence.

**INTERESTED PARTIES**

1. Jules Simeon, Sr.
2. Ida Mae Griffin Simeon
3. T. Smith & Son, Inc.
4. Lumar Marine, Inc.
5. Midland Insurance Company
6. Glacier General Insurance Co.
7. Underwriters at Lloyds, London
8. Burke & Mayer
9. Rice & Fowler
10. Porteous, Hainkel, Johnson & Sarpy
11. Hebert, Mouledoux & Bland
12. Taco Towing, Inc.
13. Yugo Marine, Inc.
14. Champion Growers, Inc.

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, August 10, 1988, is published in 852 F.2d 1421 (5th Cir. 1988).

The Opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing and rehearing en banc, November 17, 1988, is published in ____ F.2d _____ (5th Cir. 1988).

## STATEMENT OF JURISDICTION

Petitioner seeks review of the Opinion and Decree of the United States Court of Appeals for the Fifth Circuit of August 10, 1988. Petitions for Rehearing and Suggestions for Rehearing En Banc were denied by the United States Court of Appeals for the Fifth Circuit on November 17, 1988.

This Honorable Court has jurisdiction

to entertain this Petition for Writ of Certiorari by virtue of article III of the Constitution of the United States and 28 U.S.C. §1254(1) (1982).

**STATUTE INVOLVED**

The following statute is applicable to the resolution of this matter:

**46 U.S.C. §688 (1982). RECOVERY FOR INJURY TO OR DEATH OF SEAMAN:**

> **(a) Application of railway employee statutes; jurisdiction.** Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of

personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located...

## STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

On September 27, 1981, 59 year old Jules Simeon, Sr. was employed by T. Smith & Son, Inc. ("Smith") as a deckhand aboard Smith's derrick barge, PENNY. D/B PENNY, located in the Mississippi River, was engaged in unloading a cargo of iron ore from an oceangoing vessel moored along her starboard side to a hopper barge moored along her port side. M/V TAKO BANDIT, owned and operated by Lumar Marine, Inc. ("Lumar") and under charter to Smith, assisted by towing away the hopper barge once it had been loaded.

During the course of operations, Simeon received serious injuries to his right leg and foot.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT.

The Simeons brought suit to recover damages against Smith for negligence under the Jones Act[1] and against Lumar for negligence under the general maritime law. The Simeons also asserted claims against both defendants for unseaworthiness of the vessels owned by them. Smith and Lumar filed cross-claims against each other for contribution.

The Simeons' Jones Act[2] and unseaworthiness claims against Smith were tried to a jury commencing on December 16, 1985. Their general maritime law claims against Lumar were simultaneously tried to the court with the jury acting in an advisory capacity. The jury found neither

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1 46 U.S.C. § 688 (1982).

2 id.

D/B PENNY nor M/V TAKO BANDIT to be unseaworthy, but found that the casualty was caused by negligence on the part of Smith (fifty-eight percent), Lumar (thirty-two percent), and Simeon (ten percent).

After Simeon accepted the district court's remittitur of the jury's award for pain and suffering, the district court entered judgment in favor of Simeon against Smith in the amount of $508,362.75 and against Lumar in the amount of $184,476.00 (fifty-eight percent and thirty-two percent, respectively, of the damages awarded against each for pain and suffering, future medical expenses and stipulated lost wages). The district court refused to hold Lumar and Smith jointly liable for Simeon's damages.

Additionally, the district court entered judgment against Lumar alone for

all of Mrs. Simeon's loss of consortium damages ($80,000.00 less ten percent attributable to Simeon's contributory negligence) because the Jones Act[3], the only basis for Smith's liability, does not recognize a claim for loss of consortium. The district court denied pre-judgment interest on Simeon's Jones Act[4] recovery against Smith because that claim was tried to the jury. Because the general maritime law claim against Lumar was bench tried, the district court awarded pre-judgment interest on the recovery against Lumar running from the date of the casualty.

C. COURSE OF PROCEEDINGS AND DISPOSITION IN THE APPELLATE COURT

Appeals of the district court's decree were filed by all parties. On August 10,

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[3] 46 U.S.C. § 688 (1982).

[4] id.

1988, the Fifth Circuit rendered its decision. Inter alia, the Fifth Circuit directed that judgment be entered against Smith and Lumar jointly and severally for the total amount of Simeon's general and special damages.[5] It affirmed the district court's award of the entirety of Mrs. Simeon's loss of consortium recovery (less ten percent) against Lumar but reversed the district court's ruling on the issue of pre-judgment interest by holding that Lumar is liable for pre-judgment interest on all of the Simeons' damages which accrued prior to trial, including that portion of the damages assessed against Smith. The Fifth Circuit further held that Lumar has no

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[5] Ninety percent of the difference between (1) the jury's award of pain and suffering to Simeon, and (2) the amount awarded by the district court for pain and suffering at the conclusion of the bench trial, was assessed against Smith severally.

right of contribution against Smith with respect to damages for loss of consortium and pre-judgment interest.

On November 17, 1988, the Fifth Circuit denied the Petitions for Rehearing filed by all parties and the Suggestions for Rehearing En Banc filed by Smith and the Simeons.

**SUMMARY OF THE ARGUMENT**

Petitioner suggests that the Fifth Circuit's denial of its right of contribution against Smith is contrary to the rulings handed down by this Court in The Chattahoochee[6] and Weyerhaeuser Steamship Company v. United States,[7] and is in conflict with prior decisions of the Fifth Circuit and the Seventh Circuit. If

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[6] 173 U.S. 540, 19 S.Ct. 491, 43 L. Ed. 801 (1899).

[7] 372 U.S. 597, 83 S.Ct. 926, 10 L. Ed. 2d 1 (1963).

allowed to stand, the opinion of the Fifth Circuit will foster confusion and inconsistency in the enforcement of the right of contribution between joint tort-feasors under the general maritime law.

Petitioner further suggests that, as recognized by the majority of states, the traditional rule of joint and several liability is incompatible with the modern philosophy of equitable apportionment of damages inherent in the doctrine of comparative negligence. This petition presents a factual situation wherein this Court may re-evaluate the viability of joint and several liability.

## ARGUMENT

MAY IT PLEASE THE COURT:

### I.

### RIGHT OF CONTRIBUTION

The Fifth Circuit's denial of Lumar's right of contribution against Smith for pre-judgment interest and loss of consortium damages is in keeping with its previous decision in Transorient Navigators Co., S.A. v. M/S SOUTHWIND[8] and the decision of the Eighth Circuit in SCNO Barge Lines, Inc. v. Sun Transp. Co.[9], but squarely conflicts with the decision of the Seventh Circuit in Central Rivers Towing v. City of Beardstown.[10] Moreover, in relying on non-maritime federal jurisprudence for the proposition that "there can be no

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[8] 788 F.2d 288 (5th Cir. 1986).

[9] 775 F.2d 221 (8th Cir. 1985).

[10] 750 F.2d 565 (7th Cir. 1984).

contribution between concurrent tort-feasors unless they share a 'common legal liability' toward the plaintiff",[11] the Fifth Circuit failed to observe the maritime precedents to the contrary established by this Court in Weyerhaeuser Steamship Company v. United States,[12] and The Chattahoochee.[13]

Abundantly well established in admiralty is the general rule that a joint tort-feasor cast in judgment to an injured party for damages may seek contribution or

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[11] Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1434 (5th Cir. 1988), Appendix Section A at A-53, citing F. Harper, F. James, O. Gray, 3 Law of Torts §10.2 at 46 (2d Ed. 1986) and W. Prosser & P. Keeton, Prosser & Keeton on the Law of Torts §50 at 339-340 (5th Ed. 1984).

[12] 372 U.S. 597, 83 S.Ct. 926, 10 L. Ed. 2d 1 (1963).

[13] 173 U.S. 540, 19 S.Ct. 491, 43 L. Ed. 801 (1899).

indemnity from his co-tort-feasors.[14] In Transorient Navigators Co., S.A. v. M/S SOUTHWIND,[15] and SCNO Barge Lines, Inc. v. Sun Transp. Co.,[16] the Fifth and Eighth Circuits carved out an exception to the general rule by holding that nongovernmental tort-feasors in maritime cases are not entitled to maintain a claim for contribution against the United States to recover pre-judgment interest awarded to an injured party in excess of the statutorily imposed limitation on the

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[14] Phoenix Insurance Co. v. Steamboat Atlas, 93 U.S. (3 Otto) 302, 23 L. Ed. 863 (1876); Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174, 40 L. Ed. 2d 694 (1974); Transorient Navigators Co., S.A. v. M/S SOUTHWIND, 788 F.2d 288 (5th Cir. 1986); SCNO Barge Lines, Inc. v. Sun Transportation Co., 775 F.2d 221 (8th Cir. 1985); Central Rivers Towing, Inc. v. City of Beardstown, 750 F.2d 565 (7th Cir. 1984).

[15] 788 F.2d 288 (5th Cir. 1986).

[16] 775 F.2d 221 (8th Cir. 1985).

government's liability for pre-judgment interest set forth in the Suits in Admiralty Act.[17] [18] The Fifth and Eighth Circuits reasoned that to allow contribution would abrogate the principles of sovereign immunity and the interest limitation defense by enabling the nongovernmental tort-feasors to collect a greater percentage of pre-judgment interest from the United States than the injured parties could collect against the United States directly. The Courts borrowed their reasoning from traditional land-based common law which recognizes a joint tort-feasor's non-liability to the

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[17] 46 U.S.C. 741 et seq. (1982).

[18] Under §§ 743 and 745 of the Suits in Admiralty Act, 46 U.S.C. 741 et seq. (1982), a party bringing suit against the United States in admiralty may only recover pre-judgment interest at the rate of four percent (4%) per annum from the date of judicial demand.

injured party as a defense to an action for contribution.[19]

By contrast, the Seventh Circuit, in Central Rivers Towing v. City of Beardstown,[20] looked to maritime precedent in ruling that a joint tort-feasor that has paid more than its proportionate share of damages is entitled to obtain contribution for the excess amount from the other tort-feasor, regardless of any immunity the other tort-feasor may enjoy vis-a-vis the injured party. Accordingly, the Seventh Circuit held the United States liable to a nongovernmental joint tort-feasor in contribution for its proportionate share of the total damages paid by the

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[19] See SCNO Barge Lines, Inc. v. Sun Transp. Co., 775 F.2d 221, 228 (8th Cir. 1985) citing Restatement (Second) of Torts §886 A (1979).

[20] 750 F.2d 565 (7th Cir. 1984).

nongovernmental tort-feasor to the injured party, including pre-judgment interest at the rate of twelve percent (12%) per annum.

Relying on this Court's decision in Weyerhaeuser Steamship Company v. United States[21] and the decisions of two district courts sitting in admiralty, Thornton v. Hull[22] and Complaint of Sincere Navigation Corp.,[23] the Seventh Circuit opined that a joint tort-feasor's right of contribution is entirely distinct from the injured party's right of recovery. Therefore, a joint tort-feasor may be cast in judgment to pay contribution without regard to its direct liability to the injured party because

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[21] 372 U.S. 597, 83 S.Ct. 926, 10 L. Ed. 2d 1 (1963).

[22] 515 F.Supp. 715 (D. Mass. 1981).

[23] 447 F.Supp. 672 (E.D. La. 1978).

> **'[s]uch a rule ensures that the loss is distributed among those responsible for the harm and prevents one tort-feasor from being saddled with the entire liability solely because of the plaintiff's choice of defendants.'** [emphasis added][24]

The right of contribution between joint tort-feasors in admiralty was first expressed in the divided damage rule applicable in mutual fault collision cases. Under that rule, all damages arising out of the collision were added together and divided equally between the vessels at fault to ensure that each bore her fair

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[24] Central Rivers Towing v. City of Beardstown, 750 F.2d 565, 572 (7th Cir. 1984) citing Thornton v. Hull, 515 F.Supp. 715, 716 (D. Mass. 1981).

share of the losses.[25]

In Weyerhaeuser Steamship Company v. United States,[26] this Court held that the government's immunity from liability in tort to crewmembers injured on a United States vessel under the Federal Employees' Compensation Act[27] had no effect on the divided damage rule. Consequently, the United States was held liable for one-half of the full measure of damages arising out of a collision, including the amount paid by the joint tort-feasor to a governmental employee in settlement of a suit brought in

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[25] See The North Star, 106 U.S. 17, 1 S.Ct. 41, 27 L. Ed. 318 (1882); The Chattahoochee, 173 U.S. 540, 19 S.Ct. 491, 43 L. Ed. 801 (1899).

[26] 372 U.S. 597, 83 S.Ct. 926, 10 L. Ed. 2d 1 (1963).

[27] 39 Stat. 742 (1916), as amended, 5 U.S.C. § 751 et seq. (1958) (current version at 5 U.S.C. §8101 et seq. (1982)).

tort for personal injuries sustained as a result of the collision.

To the same effect is this Court's holding in The Chattahoochee,[28] wherein the damages arising out of a collision, including cargo damage, were divided equally between the two vessels at fault, notwithstanding the fact that the cargo carrying vessel was immune from any direct action for damages brought by the cargo owner under the terms of the Harter Act.[29]

Ironically, the Fifth Circuit has applied the rules of law handed down in The Chattahoochee[30] and Weyerhaeuser Steamship

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[28] 173 U.S. 540, 19 S.Ct. 491, 43 L. Ed. 801 (1899).

[29] 46 U.S.C. § 190 et seq. (1982).

[30] 173 U.S. 540, 19 S.Ct. 491, 43 L. Ed. 801 (1899).

Company v. United States[31] without exception in assessing damages against joint tort-feasors in maritime collision cases. Indeed, in Empire Seafoods, Inc. v. Anderson,[32] the Fifth Circuit held that the divided damage rule must prevail over any statutory provision which shields one joint tort-feasor from liability to the injured party[33] by reason of the fact that the right of contribution between two offending vessels in a collision case is founded on the vessels' liability to each other rather than their liability or immunity from

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[31] 372 U.S. 597, 83 S.Ct. 926, 10 L. Ed. 2d 1 (1963).

[32] 398 F.2d 204 (5th Cir. 1968), cert. denied, 393 U.S. 983, 89 S.Ct. 449, 21 L. Ed. 2d 444 (1968).

[33] 398 F.2d 204, 216 (5th Cir. 1968), cert. denied 393 U.S. 983, 89 S.Ct. 449, 21 L. Ed. 2d 444 (1968) citing Weyerhaeuser Steamship Company v. United States, 372 U.S. 597, 603, 83 S.Ct. 926, 930 (1963).

liability to injured third parties. It is respectfully submitted that, having recognized this, the Fifth Circuit erred in its denial of Lumar's right of contribution against Smith.

Here, Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.[34] and its progeny[35] were cited by the Fifth Circuit as authorities supporting its contravention of the holdings in The Chattahoochee,[36] and Weyerhaeuser Steamship Company v. United

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[34] 342 U.S. 282, 72 S.Ct. 277, 96 L. Ed. 318 (1952).

[35] Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co., 406 U.S. 340, 92 S.Ct. 1550, 32 L. Ed. 2d 110 (1972); Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174, 40 L. Ed. 2d 694 (1974); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 99 S.Ct. 2753, 61 L. Ed. 2d 521 (1979).

[36] 173 U.S. 540, 19 S.Ct. 491, 43 L. Ed. 801 (1899).

States.[37] [38] That line of cases, however, involved attempts by vessel owners to seek indemnity and/or contribution from the stevedore employers of injured longshoremen for damages paid to the longshoreman in suits to recover for personal injuries sustained aboard the vessels as a result of the mutual fault of the vessel owner and stevedore. Following this Court's decision in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.,[39] it has been uncontroverted that no indemnity or contribution can be had by the vessel owner under those circumstances because it is specifically prohibited by the

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[37] 372 U.S. 597, 83 S.Ct. 926, 10 L. Ed. 2d 1 (1963).

[38] Simeon v. T. Smith & Co., Inc., 852 F.2d 1421, 1434 - 1435 (5th Cir. 1988), Appendix Section A at A-55 - A-56.

[39] 342 U.S. 282, 72 S.Ct. 277, 96 L. Ed. 318 (1952).

provisions of the Longshore and Harbor Workers' Compensation Act.[40] The Jones Act[41] contains no such prohibition against obtaining indemnity or contribution from a seaman's employer. Therefore, Lumar is entitled to enforcement of its right of contribution under the general maritime law.

With the exception of the case at bar, Fifth Circuit has continued to uphold the right of contribution in maritime personal injury cases despite the lack of common liability of the joint tort-feasors toward the injured party. For instance, the obligation to pay maintenance and cure benefits to an injured seaman rests solely with his employer and arises regardless of

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[40] 33 U.S.C. § 901 et seq. (1982).

[41] 46 U.S.C. § 688 (1982).

fault.[42] Nevertheless, the Fifth Circuit held in Adams v. Texaco, Inc.[43] that, where the employer and another party are jointly liable for a seaman's injuries, the employer is entitled to contribution from the joint tort-feasor for maintenance and cure benefits paid to the seaman.

There is no consistency between the Fifth Circuit's ruling in Adams v. Texaco, Inc.[44] and that in the case at bar. Lumar was denied contribution against Smith on the grounds that they did not share common liability for pre-judgment interest and damages for loss of consortium. However,

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[42] Vella v. Ford Motor Co., 421 U.S. 1, 95 S.Ct. 1381, 43 L. Ed. 2d 682 (1975); Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L. Ed. 2d 88 (1962), rehearing denied, 370 U.S. 965, 82 S.Ct. 1578, 8 L. Ed. 2d 834 (1962); Adams v. Texaco, Inc., 640 F.2d 618 (5th Cir. 1981).

[43] 640 F.2d 618 (5th Cir. 1981).

[44] id.

in Adams v. Texaco, Inc.,[45] as in The Chattahoochee[46] and Weyerhaeuser Steamship Company v. United States,[47] the joint tort-feasors' common liability to the injured party was not found to be a prerequisite for the enforcement of a claim for contribution.

Contribution has been historically recognized as a fundamental right in admiralty which achieves the equitable distribution of damages between joint tort-feasors. In petitioning this Court for Certiorari, Lumar suggests that the Fifth Circuit's decision will create conflict and inconsistency in the recognition of this right within all Circuits.

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[45] id.

[46] 173 U.S. 540, 19 S.Ct. 491, 43 L. Ed. 801 (1899).

[47] 372 U.S. 599, 83 S.Ct. 926, 10 L. Ed. 2d 1 (1963).

## II.

## JOINT AND SEVERAL LIABILITY

In United States v. Reliable Transfer Co.,[48] this Court "acknowledged the sound arguments supporting division of damages between parties before the court on the basis of their comparative fault..."[49] To date, however, this Court has not addressed the issue of whether joint and several liability between concurrent tort-feasors is consistent with the loss apportionment policy inherent in the doctrine of comparative negligence.[50] As strenuously

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[48] 421 U.S. 397, 95 S.Ct. 1708, 44 L. Ed. 2d 251 (1975).

[49] Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 271, 99 S.Ct. 2753, 2762, 61 L. Ed. 2d 521, (1979).

[50] In Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 99 S.Ct. 2753, 61 L. Ed. 2d 521 (1979), this Court declined to do so in a case involving the application of the 1972 Amendments to the Longshoremen's and Harbor Worker's

urged by Judge Garwood of the Fifth Circuit in his dissenting opinion in the case at bar, the soundness of the joint liability rule is ripe for reconsideration.

At common law, joint and several liability enabled an innocent plaintiff to recover all of his damages from any one of two or more concurrent tort-feasors.[51] Joint and several liability was premised on the concept that each tort-feasor should be held accountable for all harm to which his wrongdoing contributed.[52] It is for this reason that the common law completely denied recovery to the plaintiff whose own

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Compensation Act, 33 U.S.C. § 901 et seq. (1976), on the grounds that it was properly the role of Congress to speak to the issue within the context of that statute.

[51] W. Prosser & P. Keeton, Prosser & Keaton on the Law of Torts, § 47 at 228-229 (5th Ed. 1984).

[52] W. Prosser, Law of Torts, § 47 at 297 - 299 (4th Ed. 1971).

negligence contributed even slightly to his harm.[53]

The advent of the doctrine of comparative negligence put an end to the harshness of this result by dividing liability for damages in proportion to the shares of negligence attributable to the plaintiff and defendants. However, because joint and several liability renders each joint tort-feasor answerable for the damages caused by the fault of the other, the almost universal acceptance of the doctrine of comparative negligence has led to recent outcry for the abolition or limitation of joint and several liability.[54]

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[53] id., § 65 at 416 - 418.

[54] See, Pressler & Schieffer, Joint and Several Liability: A Case for Reform, 64 Den. L. Rev. 651 (1988); Note, Reconciling Comparative Negligence, Contribution, and Joint and Several

Thirteen years ago, joint and several liability was the rule in every state.[55] Now, at least thirty-three states have either abolished[56] or substantially

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Liability, 34 Wash. & Lee L. Rev. 1159, 1174 - 1176 (1977); Pearson, Apportionment of Losses Under Comparative Fault Laws--An Analysis of the Alternatives, 40 La. 343 (1980); Fleming, Foreward: Comparative Negligence at Last -- By Judicial Choice, 64 Calif. L. Rev. 239, 252 n. 55, 258 (1976); C. Gregory, Legislative Loss Distribution in Negligence Actions, at 77-79, 142 - 148 (1936).

[55] Pressler & Schieffer, Joint and Several Liability: A Case for Reform, 64 Den. L. Rev. 651, 666 (1988), citing Granelli, The Attack on Joint and Several Liability, 71 A.B.A.J. 61, 62 (July, 1985).

[56] Utah, Wyoming, North Dakota, Kansas, Ohio and New Mexico have completely abrogated joint and several liability. See, Colo. Rev. Stat. § 13 - 21 - 111.5 (Cum. Supp. 1988); Utah Code Ann. § 78-27 - 38 (Supp. 1988); Wyo. Stat. § 1 - 1-109(d) (Cum. Supp. 1988); N.D. Cent. Code § 32-03.2 (Supp. 1987); Ohio Rev. Code Ann. § 2315.19(A)(2) (Anderson, 1981); Brown v. Keill, 580 P.2d 867 (Kan. 1978).

modified[57] joint and several liability.[58]

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[57] Washington, Arizona, Georgia, Idaho, Missouri, Montana, Iowa, Oklahoma and New Mexico have modified joint and several liability such that it would be inapplicable to the facts in the case at bar. See, Wash. Rev. Code § 4.22.070 (Cum. Supp. 1989) (several liability only except in cases involving concerted action, hazardous wastes, business torts and fungible products.); Arz. Rev. Stat. Ann. § 12 - 2506 (Cum. Supp. 1988) (several liability only except in cases of concerted action, hazardous waste or defendants liable under the doctrine of respondeat superior.); Ga. Code Ann. § 51 - 12 - 33 (Cum. Supp. 1988) (several liability only where plaintiff is contributorily negligent.); Idaho Code § 6 - 803(3) - (7) (Cum. Supp. 1988) (several liability only except in cases involving concerted action, hazardous waste or where defendant is liable under the theory of respondeat superior.); Mo. Rev. Stat. § 509.050.41 (Cum. Supp. 1988) (several liability only where plaintiff is contributorily negligent.); Mont. Code Ann. § 27-1-703(2)-(3) (1987) (defendant whose negligence is fifty percent or less of combined negligence of all parties is severally liable only.); N.M. Stat. Ann. § 43 - 3 - 1 (Repl. 1986) (several liability only except in cases involving intentional torts, vicarious liability, products liability and situations "having a sound basis in public policy".); Iowa Code Ann. §§ 668.1 - 668.3, 619.17 (West Supp. 1988); Boyles v. Oklahoma Natural Gas Co., 619

This shift away from the traditional rule of joint and several liability was prompted by the reasoning that:

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P.2d 613 (Okla. 1980). Other states which have substantially modified the application of joint and several liability are Nevada, Nev. Rev. Stat. § 41.141(3) (1986), Texas, Tex. Rev. Civ. Stat. Ann. art. 2212(a) (Vernon Supp. 1988), Indiana, Ind. Code Ann. § 34 - 4 - 33 - 5 (Burns, 1988), Louisiana, La. Civ. Code Ann. art. 2234 (West 1972), Oregon, Or. Rev. Stat. § 18.485 (1985), Pennsylvania, 42 Pa. Cons. Stat. Ann. § 7102(b) (Purdon, 1982); General State Auth. v. Sutter Corp., 452 A.2d 75 (NY, 1982), Minnesota, Minn. Stat. Ann. § 604.01(1) (West 1988), Alaska, Alaska Stat. § 09.17.080 (Cum. Supp. 1988), Connecticut, Conn. Stat. § 52-572h (Cum. Supp. 1988), Florida, Fla. Stat. § 768.81 (Cum. Supp. 1988), Illinois, Ill. Rev. Stat. § 110 (Cum. Supp. 1988), Michigan, Mich. Comp. Laws Ann. § 600.6304 (West, 1987), Minnesota, Minn. Stat. § 604.02 (Cum. Supp. 1989), New Hampshire, N.H. Rev. Stat. Ann. § 507 - B:9 (Cum. Supp. 1988), New York, N.Y. Civ. Prac. §§ 1601, 1602, (McKinney Cum. Supp. 1987), West Virginia, W.Va. Code § 55 - 7B-9 (Cum. Supp. 1988), California, Cal. Civ. Code §§ 1431.1 - 5 (West Cum. Supp. 1988), South Dakota, S.D. Codified Laws Ann. § 15 - 8 - 15.1 (Supp. 1988).

[58] Pressler & Schieffer, Joint and Several Liability: A Case for Reform, 64 Den. L. Rev. 651, 656 - 660 (1988).

> **The principle of loss apportionment by shares of negligence that isolates a defendant from liability to the plaintiff for loss due to plaintiff's negligence also should serve to isolate a defendant from liability for loss to the plaintiff attributable to the negligence of another defendant.** [emphasis added][59]

Here, Lumar was held liable for all of the loss of consortium damages and pre-judgment interest awarded less only the ten percent attributable to Simeon's contributory negligence. Smith's wrongful conduct played a substantial part (fifty-eight percent) in causing the harm being

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[59] Pearson, Apportionment of Losses Under Comparative Fault Laws -- An Analysis of the Alternatives, 40 La. L. Rev. 343, 362 (1980).

compensated, yet the Fifth Circuit achieved a back door abrogation of Smith's "immunity" from liability to the Simeons for those elements of recovery through the application of joint and several liability. Lumar has been cast in judgment to pay the portion of loss of consortium damages and pre-judgment interest to which Smith's fault gave rise, not because Smith is insolvent, but because the Simeon's have no legal right of action against Smith to recover for those losses.

Lumar submits that it is wholly inconsistent with the doctrine of comparative negligence to permit the Simeons to avoid the consequences of Simeon's employment relationship with Smith, and attendant limitations on recovery under the Jones Act,[60] by foisting

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[60] 46 U.S.C. § 688 (1982).

additional liability on Lumar. Lumar should be held responsible for only thirty-two percent of the loss of consortium damages and pre-judgment interest, the portion which equates to Lumar's degree of negligence.[61]

The majority of states have recognized

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[61] In the alternative, if the general maritime law is to espouse a modified concept of joint and several liability, Lumar would be liable for only thirty-two percent of the Simeons' damages plus some equitable portion of the sums uncollectible from Smith. See, e.g., Alaska Stat. § 09.17.080 (Cum. Supp. 1988) (a party allocated less than fifty percent of the total fault allocated to all parties, including plaintiff, is not jointly liable for more than twice the percentage of fault allocated to that party.); Conn. Stat. § 52-572h (Cum. Supp. 1988) (in the event damages are uncollectible from one party, such uncollectible amount is allocated among the other parties according to their respective percentages of fault.); Mich. Comp. Laws Ann. § 600.6304 (West 1987) (in the event damages are uncollectible from one party, such uncollectible amount is allocated among the other parties according to their respective percentages of fault.)

that the traditional rule of joint and several liability is a relic which cannot be reconciled with the modern philosophy that liability should be allocated proportionately among all those whose conduct brought about harm. By "exercising traditional discretion in admiralty",[62] this Court now has the opportunity to re-evaluate the viability of joint and several liability in admiralty in light of comparative negligence and provide the lower courts with a uniform rule for the just apportionment of damages among culpable parties in maritime tort cases which comports with the policies underlying the legislation enacted by the majority of

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[62] East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 106 S.Ct. 2295, 2302, 90 L. Ed. 2d 865 (1986) citing Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409, 74 S.Ct. 202, 204, 98 L. Ed. 143 (1953).

states.

**CONCLUSION**

Not since this Court handed down its rulings in The Chattahoochee,[63] and Weyerhaeuser Steamship Company v. United States,[64] has it reviewed and commented upon the extent to which the right of contribution between joint tort-feasors may be enforced under the general maritime law. This petition provides this Court with the opportunity to resolve a conflict between the Circuits as to whether that fundamental right should continue to prevail over one joint tort-feasor's immunity from liability to the injured party.

Additionally, it is suggested that this petition provides a factual situation

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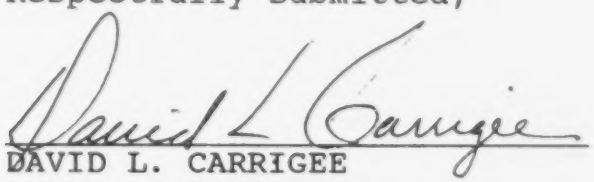
[63] 173 U.S. 540, 19 S.Ct. 491, 43 L. Ed. 801 (1899).

[64] 372 U.S. 597, 83 S.Ct. 926, 10 L. Ed. 2d 1 (1963).

wherein this Court may reconsider whether the traditional rule of joint and several liability contravenes the loss apportionment policy inherent in the doctrine of comparative negligence embraced by the general maritime law after United States v. Reliable Transfer Co.,[65] and establish a new or modified rule to achieve an equitable allocation of damages based on the proportionate degrees of fault of the parties.

Respectfully submitted,



DAVID L. CARRIGEE
JAMES G. BURKE, JR.
20th Floor - Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
Telephone: (504) 569-2900
and
BURKE & MAYER, Of Counsel
Attorneys for Petitioner

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[65] 421 U.S. 397, 95 S.Ct. 1708, 44 L. Ed. 2d 251 (1975).

**CERTIFICATE**

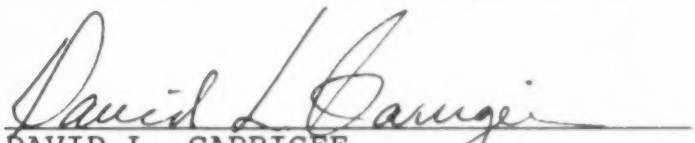
I HEREBY CERTIFY that I am a member of the Bar of this Court representing the Petitioner herein and that three copies of the above Petition for Writ of Certiorari to the United States Supreme Court were served upon:

Paul Vance, Esq.
Rice & Fowler
650 Poydras Street
Suite 2600 - Poydras Center
New Orleans, LA 70130

Andre' J. Mouledoux, Esq.
Hebert, Mouledoux & Bland
601 Poydras Street
Suite 1650
New Orleans, LA 70130

William A. Porteous, Esq.
Porteous, Hainkel, Johnson & Sarpy
704 Carondelet Street
New Orleans, LA 70130

counsel for the Respondents, first class prepaid, this 9th day of February, 1989.



DAVID L. CARRIGEE
Attorney for Petitioner